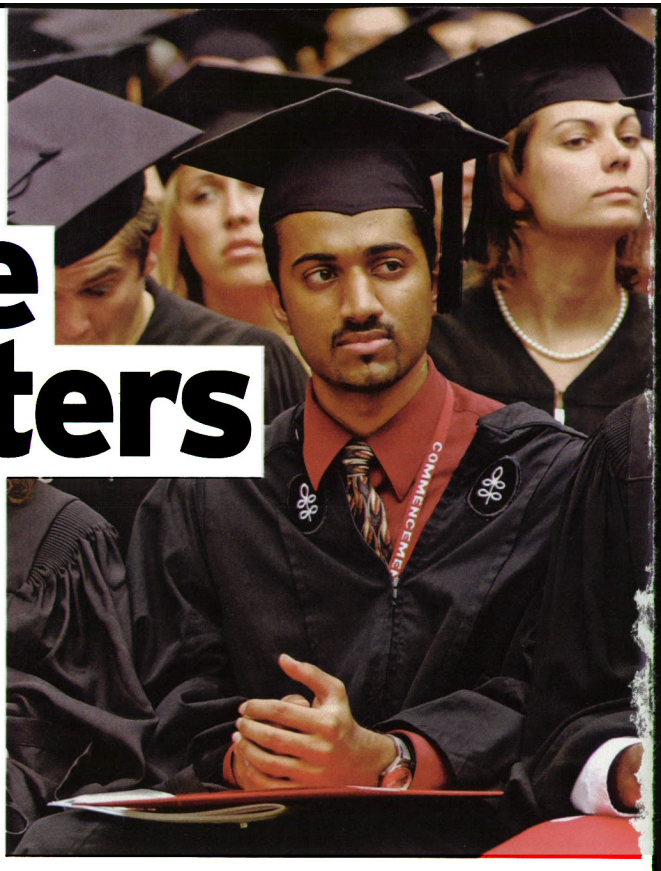
COVER STORY

Race Matters



The Supreme Court has agreed to reconsider the use of race in college admissions

BY ADAM LIPTAK IN WASHINGTON

When it comes to affirmative action, Taqee Vernon, a junior at the University of Michigan and a leader of the Black Student Union, is a big supporter. For hundreds of years, he says, African-Americans were oppressed, first by slavery and then by racial discrimination. So using race as a factor in college admissions, he says, is only fair.

"The only way to counterbalance acts *against* a people is with active acts *for* a people," says Vernon. "Before you can be completely neutral on racial grounds, you have to level the playing field."

Shawn Lewis, a junior at the University of California, Berkeley, sees it very differently. To him, affirmative action is a fundamentally unfair policy.

"We have to look at people as individuals," Lewis says. "Race says nothing about who they are or where they grew up or what kind of resources their families had. Those are the kinds of things we should be looking at."

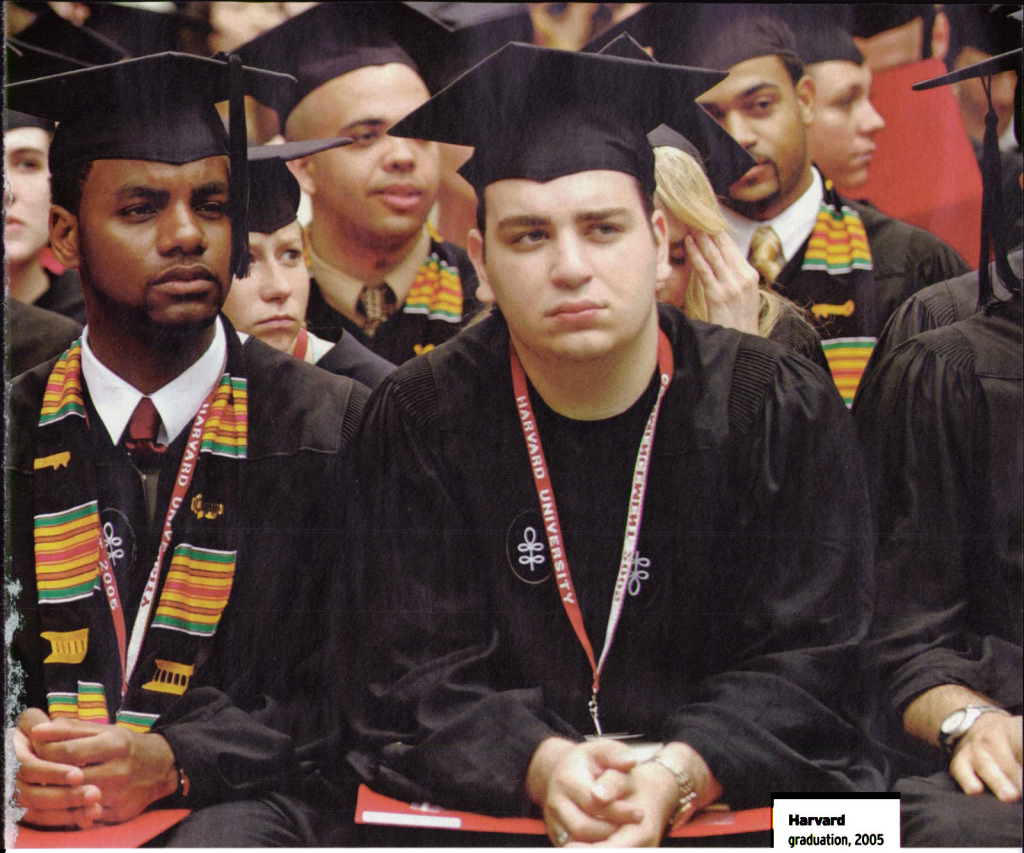
The Supreme Court has now jumped back into this contentious debate by agreeing to hear a case involving race-conscious admissions at a public university, the University of Texas. The Court's decision could have a major impact on the racial makeup of student bodies at colleges across the country.

Fewer Blacks & Latinos?

If the Court decided to bar affirmative action entirely, many educators say, it would reduce the number of black and Latino students at nearly every selective college and graduate school, with more Asian-American and white students gaining entrance instead. (A ruling forbidding the use of race in admissions at public universities would effectively bar it at most private schools as well.)

The phrase "affirmative action" was first used in 1961 in a speech by President

Adam Liptak covers the Supreme Court for The Times; additional reporting by Patricia Smith.



Harvard graduation, 2005

PHOTO BY PETER TURNLEY/CORBIS

Is affirmative action a constitutional method to address past discrimination or an unconstitutional classification by race?

John F. Kennedy. It has since come to refer to policies intended to compensate for the effects of past discrimination. Affirmative action programs have since been used in government, schools, and private companies to increase minority representation.

The case the Supreme Court has agreed to hear, *Fisher* v. *University of Texas*, was brought by Abigail Fisher, a white student who says the university denied her admission because of her race. In Texas, students in the top 10 percent of their high school class are automatically admitted to the state's public university system. That policy does not consider race but increases racial diversity in the university system in part because so many high schools are racially homogeneous.

Fisher just missed the 10 percent cutoff at her high school in Sugar Land, Texas, and was placed in a separate pool of applicants in which race is considered along with other factors. She sued in 2008 after she was rejected. (She now attends Louisiana State University.) The Court will likely hear the case in November and issue a ruling by June 2013.

Schools that use race as a factor in admissions are worried that a decision to restrict or end the use of race in college admissions could reverse efforts to create more diverse student bodies.

"I think it's ominous," says Lee Bollinger, president of Columbia University. "It threatens to undo several decades of effort within higher education to build a more integrated and just and

educationally enriched environment."

Bollinger was previously president of the University of Michigan, where he was a defendant in the last big Supreme Court case on affirmative action in college admissions: *Grutter* v. *Bollinger (see box below)*. In that 2003 case, the Court ruled 5 to 4 that public universities could take race into account in admissions in order to ensure diversity.

Opponents see the current case as an opportunity to end or curb affirmative action, which they consider reverse discrimination.

"Any form of discrimination, whether it's for or against, is wrong," says Hans von Spakovsky, a legal fellow at the Heritage Foundation whose daughter is applying to college. "The idea that she might be discriminated against and not be admitted because of her race is incredible to me."

Last September, to make a political point about affirmative action, Shawn Lewis, the Berkeley student, helped organize an "affirmative action bake sale" on the Berkeley campus. Prices were based on race, with whites charged more than blacks, Hispanics, or Native Americans.

The sale prompted outrage and charges of racism. But, Lewis wrote in response, "it is no more racist than giving an individual an advantage in college admissions based solely on their race or gender."

The courts have not been the only forum for this debate. Voters in several states, including California and Michigan, have used referendums to outlaw affirmative action in admissions at public universities and in public hiring. Public universities in those states have since seen a drop in minority admissions.

In other states and at private insti-

3 KEY AFFIRMATIVE ACTION SUPREME COURT CASES

LUKE SHARRETT/THE NEW YORK TIMES (SUPREME COURT)

CASE 1

Regents of University of California v. *Bakke* (1978)

BACKGROUND: Allan Bakke was a white applicant to the medical school at the University of California at Davis. After he was rejected, he sued the school, claiming he'd been discriminated against because the school set aside 16 percent of its slots for minorities.

OUTCOME: The Court ruled 5 to 4 that affirmative action policies are constitutional because the government has an interest in promoting diversity in higher education. But it also banned quotas that set aside a fixed number of spots for minorities, saying they violate the 14th Amendment's guarantee of equal protection under the law.

CASE 2

Grutter v. *Bollinger* (2003)

BACKGROUND: In 1997, Barbara Grutter, a white Michigan resident, was denied admission to the University of Michigan Law School. Grutter, who had a 3.8 college G.P.A. and good test scores, sued the university over its affirmative action policy, which considers race as a factor in admissions. Grutter claimed that Michigan admitted less-qualified minority applicants in violation of federal civil rights laws and the 14th Amendment.

OUTCOME: In a 5-to-4 ruling, the Court upheld the use of affirmative action in higher education, allowing universities to continue using race as a factor in admissions.

CASE 3

Fisher v. *University of Texas*

BACKGROUND: In 2008, Abigail Fisher, a white Texas resident, was denied admission to the University of Texas. Fisher sued, saying she was rejected because of her race. (She was not in the top 10 percent of her high school class, which in Texas would have guaranteed her admission regardless of race, so she was considered in a separate pool of applicants in which race is a factor.)

OUTCOME: The case is expected to be argued before the Court in November 2012 and decided by June 2013.

tutions, admissions officials generally consider race as one factor among many, leading to the admission of significantly more black and Hispanic students than if race were not taken into account.

Diversity, Justice Sandra Day O'Connor wrote in her majority opinion in the 2003 *Grutter* decision, encourages lively classroom discussions and fosters cross-racial harmony. O'Connor said the day would come when "the use of racial preferences will no longer be necessary" in admission decisions to foster educational diversity. She said she expected that day to arrive in 25 years, or in 2028.

In his dissent, Justice Clarence Thomas wrote that the school's use of race in admissions violates the Fourteenth Amendment's Equal Protection Clause.

A Different Supreme Court

To many observers, the Supreme Court's decision to reconsider affirmative action in college admissions, just nine years after the *Grutter* ruling, indicates that it could be ready to end the practice much sooner than O'Connor predicted.

The Court's membership has changed since 2003. Justice O'Connor, whose swing vote in *Grutter* kept affirmative action in place, retired in 2006 and was replaced by Justice Samuel A. Alito, who has voted with the Court's conservative justices in decisions against the government's use of racial classifications.

And the current Chief Justice, John G. Roberts Jr., has been skeptical of government programs that take race into account.

"The way to stop discrimination on the basis of race is to stop discriminating on the basis of race," he wrote in a 2007 decision that limited the use of race to achieve integration in public school districts.

In the upcoming case, the Justices will be trying to balance two very important but competing interests, says Supreme Court expert Jeffrey Rosen.

"On the one hand, there's the view that there are tremendous educational benefits to diversity," Rosen says. "On the other hand, there's the constitutional principle that any classification by race should be viewed with skepticism." ●

PETE MCBRIDE/NATIONAL GEOGRAPHIC SOCIETY/CORBIS; IMIGRANT WORKER; 20TH CENTURY FOX FILM CORP./VIA EVERETT COLLECTION (MYD BLUE); JOHN MOORE/GETTY IMAGES (JUVENILE JUSTICE)

Also on the Docket . . .

Some of the key cases the Court is considering this term; rulings are expected by the end of June.

IMMIGRATION: ***Arizona* v. *United States*.** In 2010, Arizona enacted a controversial law that allows police to demand immigration papers from anyone they suspect of being in the U.S. illegally. The federal government sued to block the law, saying immigration is a federal, not a state, matter.

HEALTH CARE LAW: ***Florida* v. *Department of Health and Human Services*.** Twenty-six states are challenging the constitutionality of the 2010 federal health care law. The law, which requires everyone to have health insurance or pay a fine, is one of the central legislative achievements of President Obama's first term, but it passed Congress without a single Republican vote. The case hinges on whether Congress has the authority to require the purchase of health insurance. Critics say this "individual mandate" is unconstitutional, because the government shouldn't be able to force an individual to buy a commercial product. The Obama administration says the Constitution gives Congress the power to regulate interstate commerce, including the health-care industry.

NUDITY AND PROFANITY ON TV: ***Federal Communications Commission* v. *Fox Television Stations*.** The case involves the broadcast on Fox of brief profanity by celebrities on two Billboard Music Awards shows in 2002 and 2003 and partial nudity in 2003 on ABC's now-defunct police drama *NYPD Blue*. The question is whether the FCC's "indecency enforcement regime" violates the First Amendment right to freedom of expression. The case may determine if the government still has a "compelling interest" in regulating cursing and nudity on broadcast TV when many Americans routinely encounter them on cable TV and the Web.

JUVENILE JUSTICE: ***Miller* v. *Alabama* and *Jackson* v. *Hobbs*.** The Court will consider whether the Eighth Amendment's ban on "cruel and unusual punishments" prohibits sentences of life without parole for juveniles who've committed murder. The two cases involve 14-year-olds whose crimes resulted in grisly deaths. Is it constitutional to lock someone up for life based on something they did at such a young age? *(See "Locked Away Forever" in the Jan. 2, 2012, issue of Upfront.)*